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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD (PARTIAL)* OF THE 572nd MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 18 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

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* No summary record was prepared for the rest of the meeting.

This record is subject to correction.

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The meeting was called to order at 2.10 p.m.

The discussion covered in the summary record began at 2.55 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (*continued*) (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Adds.1-4; A/CN.9/XXVIII/CRP.5/Add.1, A/CN.9/XXVIII/CRP.7)

Article 11 (*continued*)

1. **The CHAIRMAN** suggested that article 11 should be approved subject to the understanding that the debate was not closed, since a number of issues remained unresolved.

2. **Mr. SORIEUL** (Secretariat) thought that a distinction could be made in the report between the paragraphs on which agreement had been reached and the proposed new paragraph (6), which had given rise to problems and would have to be further discussed at the next session. The latter paragraph could be enclosed in square brackets.

3. **The CHAIRMAN** said that he took it that article 11 was approved on that understanding.

4. *It was so decided.*

Article 9 (*continued*)

5. **The CHAIRMAN** said there had been informal consultations between various groups on the article. He invited the Australian representative to report on the outcome of those consultations.

6. **Mr. GRIFFITH** (Australia) noted that a revised version of article 9 had been proposed by the drafting group in document A/CN.9/XXVIII/CRP.5/Add.1, prepared the previous evening. That morning further consultations had produced a new revision. It was proposed that paragraph (1) (c) should read: "such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time of its transmission or reception". Paragraph (2) would read: "An obligation to retain information in accordance with paragraph (1) shall not extend to any information the sole purpose of which is to enable the message to be transmitted or received".

7. **Mr. MADRID** (Spain) said he was not sure whether the text made sufficiently clear that the information referred to in paragraph (1) (c) was not the same as that referred to in paragraph (2). The information in paragraph (2) was information which, though it entered the addressee's system, was not retained by that system.

8. **Mr. GRIFFITH** (Australia) said that not all information transmitted would in fact enter the system. It was necessary to identify in paragraph (2) the type of information that need not be retained. Although such information might have entered the system, it was not in practice retained, although it would be technically possible to retain it.

9. **Mr. ABASCAL ZAMORA** (Mexico) wondered whether article (9) (1) (c) was necessary. He took it that the intent of the provision was to make it possible for addressees not to retain any unnecessary information that might accompany data messages. The requirement in paragraph (1) (c) that information as to the date and time of transmission and reception be retained was comparable to requiring recipients of letters to keep the envelopes. That seemed to be contrary to the purpose of the provision, which was to ensure that legal obligations in regard to the intention of data messages were not more stringent than those in regard to the retention of documents. As he saw it, paragraph (2) was sufficient to fulfil that purpose.

10. **Mr. CAPRIOLI** (France) endorsed the proposed new text. In response to the criticisms made, he believed it should be sufficient to include in the Guide an explanation of the difference between an envelope and its contents, so as to make clear the distinction between paragraph (2) and the rest of the article. It seemed to him clear that paragraph (1) (c) would not prevent the addressee from retaining more information if his system allowed it.

11. **Mr. MADRID** (Spain) said that he agreed with the representative of Mexico that paragraph (1) (c) was superfluous. The proposed new wording of paragraph (2) met the concerns of the Working Group and reflected the discussion that had taken place in the Commission. The retention requirement for EDI should not be more onerous than for paper.

12. **Mr. GRIFFITH** (Australia) said, in response to the representative of Mexico, that an envelope might in some cases be used as an addition to the message itself to determine the origin, destination, date and time. Paragraph (2) made it possible to discard the envelope if that information were contained in the message. It therefore lightened the burden imposed by paragraph (1) (c) and would become inoperable if that subparagraph were to be deleted.

13. **Mr. SORIEUL** (Secretariat) said that, whether information concerning the origin, destination, date and time of a data message were available outside or inside an "electronic envelope", both the old and the new versions of paragraph (1) (c) required that it should be retained. As he understood it, the Commission had already decided to impose as a minimum requirement the retention of those items of information, if they existed.

14. **Mr. ABASCAL ZAMORA** (Mexico) noted that the version of paragraph (2) in document A/CN.9/406 referred to "information ... which does not enter the information system of, or designated by, the addressee". That aspect did not seem to have been covered in the new version.

15. **Mr. GRIFFITH** (Australia) said he understood that the information transmitted for communication control purposes might well enter the system but be automatically discarded prior to its emergence. It was thought that the Working Group's version of paragraph (2) did not deal adequately, from a technical point of view, with the question of which information could be dispensed with. The proposed new paragraph made it irrelevant whether information had entered the system or not.

16. **Mr. MADRID** (Spain) asked whether information concerning origin, destination, time and date included in the "electronic envelope" solely for the purpose of enabling the data message to be transmitted or received could be discarded under the terms of paragraph (2).

17. **Mr. SORIEUL** (Secretariat) said that it was difficult to conceive of a case in which such information fell into the category of data that were automatically destroyed.

18. **The CHAIRMAN** suggested that the Commission should adopt paragraph (1) (c) and paragraph (2) as read out by the representative of Australia.

19. *It was so decided.*

Article 10 (*continued*)

20. **Mr. BURMAN** (United States of America) said that, as agreed, a group of delegations had met informally to consider the possible addition of a saving clause to article 10. As a result of their work, he proposed the inclusion in the article of a paragraph reading: "This article is not intended to deal with any rights arising under other chapters of this Law". That would be paragraph (2) and the existing wording of the article would become paragraph (1). A suggestion for a further statement, which his delegation found self-evident and therefore neither recommended nor opposed, was to complete the proposed paragraph (2) with the words ", or by virtue of other applicable law".

21. **Ms. ZHANG Yuejiao** (China) supported the United States proposal and the inclusion of the complementary statement. Rights arising under other rules of law should be safeguarded. In regard to chapter II, for example, the requirements for writing and signature were requirements of the kind which in some countries parties could not disapply by agreement between themselves.

22. **Mr. PELICHET** (Observer for the Hague Conference on Private International Law) disagreed with the idea of including the complementary statement, for the reasons he had given at the previous meeting in regard to paragraph (8) of article 11. It was unnecessary to cater for conflictual issues in articles which did not raise problems of that kind, it being self-evident that the operation of other applicable law was safeguarded. Those dealing with the Model Law in future who had not attended the present meetings would ask themselves why such a confusing statement appeared in it.

23. **Mr. SORIEUL** (Secretariat) said that the intention was simply not to exclude the possibility that rights and obligations might exist which resulted from rules of law other than those in chapter III.

24. **Mr. SCHNEIDER** (Germany) said that his delegation neither supported nor opposed the proposed paragraph (2), but considered that the point it dealt with should be addressed in the Guide and not in the text of the Law. His delegation's concern was to ensure that the Model Law, having admitted the principle of equivalency of paper documents and electronic messages, should preserve the possibility for the parties to require as between themselves that "writing" should mean writing in the traditional sense.

25. **Mr. SORIEUL** (Secretariat) explained that the proposal for paragraph (2) merely sought to avoid an *a contrario* interpretation of the existing paragraph, to the effect that the Model Law deprived parties of a right previously available to them under domestic law to agree between themselves what constituted writing, signature or the evidential value of a paper document by comparison with an electronic message. If under applicable German law parties had such a right, paragraph (2) would confirm it and make clear the fact that paragraph (1) did not circumscribe the autonomy of the parties.

26. **Mr. UCHIDA** (Japan) found the proposed paragraph (2) misleading and preferred the single paragraph approved by the Working Group, which should remain where it was.

27. **Mr. GRIFFITH** (Australia) suggested placing the proposed paragraph (2) in square brackets.

28. **Mr. RAUSCHER** (Austria) believed that the problem faced by the German delegation turned on the meaning of the term "rule of law" in articles 5, 6 and 7. Was the expression confined to statutory and jurisdictional rules or did it include contractual stipulations as well? If not, he believed that the concern of Germany was met by the text already before the Commission.

29. **Mr. SORIEUL** (Secretariat) said that the view of the Secretariat was that a contractual stipulation was not a rule of law. He thought that that should be stated in the Guide.

30. **Mr. ALLEN** (United Kingdom) endorsed the observations made by the German representative. The proposed paragraph (2) was obscure and did not achieve its purpose. It seemed simply to say that article 10 did not apply to any rights contemplated in chapter II; that was unnecessary, because otherwise the provision in article 10 would be in chapter I. He suggested that paragraph (2) should be worded along the following lines: "Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in articles 5, 6 or 7."

31. **Mr. ABASCAL ZAMORA** (Mexico) favoured the inclusion in the proposed paragraph (2) of the complementary statement read out by the United States representative. However, in order to meet the concerns expressed by other delegations, the word "applicable" might be deleted. He needed more time to consider the implications of the United Kingdom suggestion.

32. **Mr. CHOUKRI SBAI** (Observer for Morocco) agreed with the representatives of Japan and the United Kingdom that the proposed paragraph (2) was misleading. The paragraph was unnecessary. Article 10 should remain as it was and where it was, expressing clearly the fact that the Model Law applied to chapter III only and did not affect the operation of chapter II.

33. **Mr. BURMAN** (United States of America) said that the Commission should not at that stage reopen policy issues already decided on but should concentrate on drafting matters. He would support the formulation proposed by the United Kingdom representative.

34. **Mr. ABASCAL ZAMORA** (Mexico) said that after consideration he could agree to the United Kingdom proposal if it also referred to article 8 on the admissibility and evidential value of data messages.

35. **Mr. MADRID** (Spain) said that though the provision under discussion was unnecessary for his country, in the spirit of consensus he would not oppose it. He could also support the United Kingdom proposal, but thought that reference should also be made to article 8, as proposed by the representative of Mexico. However, the paragraph should be located in chapter I, with the necessary consequential drafting changes.

36. **The CHAIRMAN**, after inviting delegations to indicate their attitude to the United Kingdom proposal and the Mexican proposal, noted that there was support for the United Kingdom proposal but not for the Mexican proposal.

37. **Mr. PELICHET** (Observer for The Hague Conference on International Private Law) asked whether discussion of the problem could be continued at the next session of the Commission and whether written comments still could be submitted.

38. **Mr. GRIFFITH** (Australia) suggested that the question should be considered further at the next session and that the text of the United Kingdom proposal should be included in the text in square brackets.

39. **The CHAIRMAN** wondered whether both the United States and the United Kingdom proposals might be inserted in square brackets, as alternatives.

40. **Mr. BURMAN** (United States of America) noted with concern the remarks of the observer for the Hague Conference on Private International Law and the suggestion that the alternative proposals should be included in square brackets. The precise wording might be left open, but he would not want the implication to be that the decision to have such a paragraph was not final. He thought that it was essential for the Commission's work that decisions already taken should be respected.

41. **Mr. SORIEUL** (Secretariat) asked the representative of the United Kingdom if he could explain why there was a reference to articles 5, 6 and 7 but not to articles 8 and 9 in his proposal.

42. **Mr. ABASCAL ZAMORA** (Mexico) said that adopting the United Kingdom proposal without a reference to article 8 would be tantamount to changing an agreement that had already been reached. The omission of a reference to article 8 would create serious problems for his country's legislation, because the preferred procedure was that of contract law, where, provided that the rights of the parties were not affected, the parties could go before a court and specify the rules of evidential procedure that they wished to follow. If a reference to article 8 was not included, he would prefer the version read out by the United States representative.

43. **Mr. ALLEN** (United Kingdom) said that he was not sure why a reference to article 8 would be necessary in practice, but would suggest that Mexico's concern could be accommodated by replacing the reference to articles 5, 6 and 7 by a reference to chapter II.

44. **Mr. ABASCAL ZAMORA** (Mexico) thanked the representative of the United Kingdom for his suggestion. The reason for his concern was that in some situations parties wishing to prevent dilatory action might agree that a data message would not be admissible as evidence, whereas article 8 seemed to rule that out.

45. **The CHAIRMAN** suggested that the Commission might wish to adopt the following text for paragraph (2) of article 10:

> "Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II."

46. *It was so decided.*

The meeting rose at 5.05 p.m.